APPENDIX B

Opinion of the District Court of Appeal, First District, Division Two

[Civ. No. 15977. First Dist., Div. Two. May 14, 1954, amended, June 11, 1954.]

The Pacific Mutual Life Insurance Company (a corporation) *et al.*, appellants, v. John R. Maloney, as Insurance Commissioner, etc., *et al.*, respondents.

Appeal from a judgment of the Superior Court of Los Angeles County. Paul Nourse, Judge. Affirmed.

Proceeding in mandamus to rescind order of Insurance Commissioner approving plan to mutualize an insurance company. Judgment denying writ affirmed.

Joseph L. Lewinson and Henry W. Low for appellants.

C. Ray Robinson and William B. Boone, as Amici Curiae on behalf of appellants.

O'Melveny & Myers, Paul Fussell, Homer I. Mitchell, James E. Cross, George B. Gose, Frank P. Doherty, Guy Knupp and Peery Price for respondents.

Lloyd W. Dinkelspiel and Heller, Ehrman, White & McAuliffe, as Amici Curiae on behalf of respondents.

GIBSON (Lilburn), *J. pro tem.**—This is an appeal from a judgment of the Superior Court, which denied a peremptory writ of mandate, and discharged an alternative writ previously issued.

The peremptory writ was sought under the provisions of Section 1094.5 of the Code of Civil Procedure to rescind an order of the Insurance Commissioner approving a plan to mutualize Pacific Mutual Life Insurance Company, a California corporation (referred to hereinafter as "New Company").

The alternative writ discharged by the judgment included an order staying the execution of the Plan of Mutualization. By stipulation a stay order was made by the

*Assigned by Chairman of Judicial Council.

District Court of Appeal, Second Appellate District, Division Three, prior to the expiration of the stay order made by the Superior Court. The stay order made by such appellate court is now in force.

The Plan of Mutualization was submitted to Honorable Wallace K. Downey as Insurance Commissioner in his character as an administrative officer, purportedly in pursuance to the provisions of subdivision (c) of Section 11526 of the Insurance Code (relating to the mutualization of nondelinquent stock companies), which provides that such a Plan of Mutualization must be approved by the board of directors of a company and its stockholders, and the Insurance Commissioner.

Order approving the plan was made after a hearing under Section 11527 of the Insurance Code, which provides:

"The commissioner shall examine the plans submitted to him under the provisions of subdivision (c) of Section 11526. He shall not approve such plan unless in his opinion the rights and interests of the insurer, its policyholders and shareholders are protected nor unless he is satisfied that the plan will be fair and equitable in its operation."

After the conclusion of the hearing Mr. Downey, as commissioner, made affirmative findings in accordance with the provisions of the section, and approved the Plan of Mutualization.

The petition for mandate alleges that the order of the insurance commissioner was made without jurisdiction and was not justified by the evidence.

Appellants, who were petitioners below (sometimes referred to herein as petitioners), are The Pacific Mutual Life Insurance Company of California, a California corporation (referred to hereinafter as "Old Company"), and Samuel K. Rindge, and others, who are stockholders in the Old Company, and the members of Pacific Mutual Shareholders Protective Committee.

In the receivership proceedings Honorable Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, first acted as conservator and then as liquidator of the Old Company, and several successors as Insurance Commissioners, including Honorable John R. Maloney, have acted as liquidator and Mr. Maloney now acts as liquidator.

Respondents below and here are the New Company and Mr. Maloney, as Insurance Commissioner of the State of California and as liquidator of the Old Company.

The order approving the Plan of Mutualization was made by Mr. Downey on September 22, 1950, at the time he was Insurance Commissioner of California and liquidator of the Old Company. He was named in the petition for mandate as a respondent, both in his character as Insurance Commissioner and as liquidator; but during the pendency of the proceeding in mandate, Mr. Downey was succeeded in both capacities by Mr. Maloney, and Mr. Maloney was accordingly substituted for Mr. Downey and the cause proceeded against Mr. Maloney in both capacities.

In 1936 The Pacific Mutual Life Insurance Company of California was in the possession of the Insurance Commissioner as conservator by reason of its insolvency. On December 4, 1936, by order of the court in the proceedings for the conservatorship of Old Company, title to all of the outstanding capital stock of New Company was vested in the Insurance Commissioner, as conservator of Old Company, subject to an option in favor of the participating life policyholders of New Company, giving them the right, after the expiration of approximately 10 years, to institute mutualization proceedings, that is, proceedings to cause New Company to purchase its capital stock for the purpose of converting the company from a stock company to a mutual company. Such option was contained in the rehabilitation and reinsurance agreement under the terms of

which the business of Old Company was rehabilitated by organizing a new and solvent company, which acquired most of the assets and assumed most of the liabilities of Old Company. The rehabilitation and reinsurance agreement is the source and basis of appellants' claim to the equitable interest in the proceeds of any sale of New Company stock that might be made by the Insurance Commissioner as liquidator (formerly conservator) of Old Company.

The rehabilitation and reinsurance agreement is also the source and basis of the right of the participating life policyholders of New Company to cause the company to acquire its stock (and thus accomplish its mutualization) at such price and upon such terms as might be fixed by a price determination committee, to be selected by the president of Stanford University, the provost of the University of California at Los Angeles, and the president of the Association of Life Insurance Presidents (the name of which was later changed to Life Insurance Association of America). That agreement, including the option in favor of the participating life policyholders of New Company, was, with the approval of Judge Henry M. Willis, after a hearing in the proceedings for the conservatorship of Old Company, executed by the conservator and by New Company. Judge Willis's order of approval, dated December 4, 1936, adjudged that the rehabilitation and reinsurance agreement was valid. Appeals were taken and the judgment was affirmed. (Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307 [74 P. 2d 761]; Neblett v. Carpenter, 305 U. S. 297 [59 S. Ct. 170, 83 L. Ed. 182].)

In 1946, upon request of the requisite number of life policyholders, a price determination committee was appointed, and thereafter such committee determined that mutualization was practicable of accomplishment, promulgated a Plan of Mutualization, and fixed the price and

terms of payment at which the life policyholders of New Company should have the right to acquire the stock of New Company from the liquidator (who had by that time become successor of the conservator) of Old Company.

On September 22, 1950, the Insurance Commissioner, after a lengthy hearing, found that the Plan of Mutualization was fair and equitable to the stockholder, as well as to all other interested parties, and approved the plan.

In response to the petition for a writ of mandamus filed by appellants for the purpose of inquiring into the validity of the Insurance Commissioner's approval of the Plan of Mutualization there were presented to the Superior Court the questions of whether the Insurance Commissioner proceeded without or in excess of his jurisdiction, and whether the commissioner accorded a fair trial to those opposing the plan, and whether the commissioner committed any prejudicial abuse of discretion, particularly whether the commissioner proceeded in the manner required by law, and whether his approval of the plan was supported by substantial evidence in the light of the whole record. After a hearing, the judge of said court filed a carefully prepared opinion, in which he held that the Insurance Commissioner had not acted without or in excess of his jurisdiction, had accorded a fair trial to those opposing the plan, and had not abused his discretion in approving the plan.

Since appellants raise questions as to whether the rehabilitation and reinsurance agreement dated December 4, 1936, is valid in respect of the option to mutualize granted to the participating life policyholders; whether the validity of such agreement is *res judicata;* whether New Company, which has been carrying on a nationwide insurance business since 1936, should now be treated as insolvent for the purposes of mutualization; whether the requisite statutory steps were taken for mutualization of

New Company, and whether the price determination committee acted in good faith in fixing the price and terms of payment for the stock of New Company, it is essential to present in some detail what preceded the Insurance Commissioner's hearing as well as what took place at the hearing.

Old Company was engaged in the business of writing both participating and nonparticipating life insurance and accident and health insurance. The report of the regular Triennial Convention examination of Old Company made as of December 31, 1935, showed that Old Company was insolvent. The insolvency arose out of the fact that the premium rates charged by Old Company to the holders of noncancellable accident and health policies (hereinafter referred to as "non-can policies") were inadequate. The result was that the reserves for non-can policies were inadequate and Old Company was insolvent by at least $17,000,000. Said report was filed with the Insurance Commissioner on July 21, 1936. On July 22, 1936, pursuant to the provisions of Section 1011 of the Insurance Code, the Insurance Commissioner filed with the Superior Court in Los Angeles an application for an order appointing him conservator of Old Company and vesting in him title to all of the assets of that company. We shall hereafter refer to such proceedings as "conservatorship proceeding."

Said application was presented to Judge Douglas L. Edmonds, then presiding judge of said court, and Judge Edmonds on July 22, 1936, signed the order applied for. Pursuant to said order and pursuant to Section 1013 of the Insurance Code, which authorized seizure without notice or court order, the Insurance Commissioner took possession of all of the assets of Old Company. (Carpenter v. Pacific Mut. Life Ins. Co., *supra,* 10 Cal. 2d 307, 314-317).

On July 22, 1936, Judge Edmonds also signed "Order Permitting, Approving and Authorizing Rehabilitation Sale and Transfer of Assets and Reinsurance Plan and Agreement of The Pacific Mutual Life Insurance Company of California" pursuant to the provisions of Section 1043 of the Insurance Code. Said order, among other things, authorized the organization of New Company with a capital and surplus of $3,000,000, to be provided from the funds of the participating life division of the life department of Old Company. In addition thereto, the participating life division of the life department of Old Company was to furnish to New Company the sum of $1,792,-118.97 as a reserve for the non-can policies which were to be partially assumed by New Company under the rehabilitation agreement approved by Judge Edmonds. Said rehabilitation agreement further provided that the stock of New Company should be held by the Insurance Commissioner as conservator, subject to the right of New Company to become mutualized "as soon as legally possible."

In accordance with Judge Edmonds' order, the Insurance Commissioner organized New Company and the participating life policyholders contributed to New Company the total sum of $4,792,118.97, $3,000,000 of which constituted the capital and surplus of New Company, and $1,792,118.97 of which constituted a reserve for non-can policies which were to be partially assumed by New Company.

Said sum contributed by the participating life policyholders constituted all but $423,136.26 of the surplus of the participating life division of the life department of Old Company. Said sum had been earmarked for and was owned by the participating life policyholders of Old Company, because Old Company had conducted its participating life division as if it were a separate mutual life insurance company. A separate set of

books had been maintained for the participating life division; specific expenses had been charged to said division, separate surplus had been maintained for said division; separate annual statements had been prepared for said division, and the so-called "dividends" or returns of premium made to participating life policyholders had been charged against the funds of said division.

After the organization of New Company the commissioner, as conservator, in accordance with Judge Edmonds' order, transferred to New Company substantially all of the assets of Old Company. As consideration for such assets, New Company delivered to the conservator all of the capital stock of New Company, which he was to hold, subject to the provisions of the rehabilitation agreement approved by Judge Edmonds. On July 23, 1936, New Company intervened and became a party to the conservatorship proceeding. Shortly thereafter it was found that Justice Edmonds was the owner of a policy of life insurance issued by Old Company, and that he was, therefore, disqualified. It was ultimately held that his orders were void (Carpenter v. Pacific Mut. Life Ins. Co., *supra*, 10 Cal. 2d 307, 323).

Upon discovery of Judge Edmonds' disqualification, the application of the Insurance Commissioner for appointment as conservator of Old Company was assigned to and heard by Judge Henry M. Willis, and on August 11, 1936, Judge Willis made a new order appointing the Insurance Commissioner as conservator and ratifying an appointment theretofore made by Judge Edmonds. It was held that notwithstanding the invalidity of Judge Edmonds' orders, the conservator's seizure of the assets of Old Company was lawful (Carpenter v. Pacific Mut. Life Ins. Co., *supra*, 10 Cal. 2d 324). However, Judge Willis did not, on August 11, 1936, make any order with respect to the rehabilitation agreement theretofore approved by Judge Edmonds or with respect to the transfer of Old Company's assets to New

Company and the issuance of New Company's stock to the conservator. Nevertheless, New Company held the assets of Old Company and the conservator held all of the capital stock of New Company. In view of the fact that the rehabilitation of the business of an insolvent insurer and the transfer of assets of such an insurer can be made only with court approval (Ins. Code §§ 1043 and 1037 subd. d), the invalidity of Judge Edmonds' orders left the permanent status of the assets and the stock in suspense until Judge Willis's order of December 4, 1936, which will hereinafter be referred to.

During the period between July 22, 1936, and December 4, 1936, New Company acted as a corporate agent of the Insurance Commissioner to assist him in carrying on the business of the Old Company.

As was stated by the Supreme Court in the Carpenter case, *supra*: It was obvious that if the agency organization were to be preserved pending court approval of the rehabilitation plan, the business of the Old Company had to be continued. Faced with these facts, the commissioner determined to organize a New Company to continue the business pending the approval of a rehabilitation plan. And it was pending the approval of a rehabilitation plan that New Company acted as a corporate agent of the Insurance Commissioner. (Carpenter v. Pacific Mut. Life Ins. Co., *supra*, 10 Cal. 2d 307, 325.)

On August 29, 1936, Judge Willis ordered all interested parties to show cause why they should not approve the rehabilitation agreement which Judge Edmonds had theretofore purported to approve. Numerous parties, including individual stockholders and the Pacific Mutual Stockholders Protective Committee, filed objections to such rehabilitation agreement. (Carpenter v. Pacific Mut. Life Ins. Co., *supra*, 10 Cal. 2d 319.)

On September 25, 1936, the Insurance Commissioner filed a "Petition for Approval of the Rehabilitation and Reinsurance Agreement," attached to which was the rehabilitation and reinsurance agreement which constitutes the basis of the rights of the conservator and his successors as owners of all of the stock of the company, and the basis of the rights of appellants herein, who claim an equitable interest in the stock of New Company, and the basis of the rights of the participating life policy holders under the option contained therein to cause New Company to be mutualized. Said petition prayed for an order ratifying, confirming and approving the acts of the commissioner as conservator and causing to be formed, forming and subscribing to and purchasing the capital stock of New Company, and ratifying, confirming and approving the transfer and conveyance therefore made of the assets of Old Company to New Company. Said petition further prayed that the rehabilitation and reinsurance agreement be approved and that the conservator be authorized and directed to execute said agreement and to carry out its provisions.

On the same date, the court issued an order requiring Old Company, New Company, and all persons interested or claiming to be interested, either as policyholders or stockholders of Old Company, or otherwise, to show cause why the court should not make orders in accordance with the conservator's petition.

After a protracted hearing pursuant to said order to show cause, in which Pacific Mutual Stockholders Protective Committee, numerous individual stockholders and others were heard, Judge Willis made his order of December 4, 1936, in which he ratified, confirmed and approved the acts of the conservator in organizing and subscribing to and acquiring the capital stock of New Company, and in transferring to New Company the sum of $3,000,000

out of the assets in his hands as a conservator, and ratifying, confirming and approving the transfer and conveyance theretofore made of the assets of Old Company to New Company.

Said order approved "each and all of the terms and conditions" of the rehabilitation and reinsurance agreement and authorized and directed the conservator to enter into said agreement, and authorized him "without further order of this court, fully and faithfully to perform, carry out, and discharge each and all of the obligations, terms, conditions, and covenants on his part required to be performed under the terms of said Rehabilitation and Reinsurance Agreement," and "forever barred and enjoined [all persons] from making hereafter any complaint in respect of the said Rehabilitation and Reinsurance Agreement, or any provision or provisions thereof, except as in said agreement specifically permitted or by appeal from this Order; the prosecution by any person, firm, or corporation of any proceeding or proceedings of whatever kind or nature, for the purpose of attacking this Order, or any conveyance or transfer made pursuant hereto, (other than as permitted by said Rehabilitation and Reinsurance Agreement or by appeal from this Order)."

The Rehabilitation and Reinsurance Agreement provided for the transfer to New Company of substantially all of the assets of Old Company and for the reinsurance and assumption by New Company, at the election of the respective policyholders, of all policies of insurance other than non-can policies, and on reduced rates of benefit, for reinsurance and assumption by New Company at the election of the policyholders of all non-can policies of insurance. It provided that New Company should establish a participating department, whose assets should be held and whose business should be carried on in the same manner as if it constituted a separate mutual life insurance company.

It further provided that New Company should establish a separate department for its Nonparticipating Life Insurance, and a separate department for its Accident and Health Insurance, and that any surplus existing in said departments might be used for general corporate purposes subject to limitations contained in Paragraph 14 of said agreement.

In Paragraph 14 it was provided that a special fund should be established from funds available for general corporate purposes for the purpose of completely restoring the non-can benefits which had been reinsured and assumed on reduced basis. It was further provided that there should be transferred to such fund such amounts as the board of directors should in its discretion determine to be not reasonably required for the reasonable, proper and profitable conduct of the operations of New Company as a going concern. It was further provided that at the time of any examination of New Company by the Insurance Commissioner, the commissioner might require the transfer of additional funds to such special fund, to the extent that such additional funds available for general corporate purposes were, in his opinion, available without interfering with the proper and profitable conduct of the business of New Company as a going concern.

These provisions with respect to restoration of non-can benefits were made "to the end that the benefits originally provided in said Non-Can Policies as written may eventually be fully paid, including eventual full payment of benefits becoming due prior to the time of such restoration, with interest on deferred restoration payments of such benefits at the rate of three and one-half percent (3½%) per annum."

The Rehabilitation Agreement provided for the transfer to New Company from the participating division of the life department of Old Company of the sum of $3,000,000 as

capital and surplus and of the sum of $1,792,118.97 as a reserve for the Accident and Health Department, and further provided for the transfer to New Company, for its general corporate purposes, of not to exceed 10 per cent of the net profits on participating policies reinsured pursuant to said agreement. Profits from participating policies thereafter written were not to be affected thereby and were to be held in the walled-off participating department of New Company.

Paragraph 20(a) of the Rehabilitation and Reinsurance Agreement created an *option* in favor of the participating life policyholders to cause the company to be mutualized under the conditions specified therein. Said right of the participating life policyholders was referred to in Paragraph 20 as "an option to mutualize." It was provided therein that after a period of approximately 10 years, 10 per cent of the participating life policyholders could request the creation of an appointing committee to exercise duties in respect of a mutualization of New Company for the benefits of the departments of New Company designated by such policyholders; that the appointing committee should designate a price determination committee; that the price determination committee should determine whether, in its opinion, mutualization of New Company was then practicable and that, if it determined that mutualization was then practicable it should determine the proper price to be paid for the stock of New Company upon such mutualization and appropriate terms of payment. Said agreement provided further, in order that said option might be an effective option, binding upon the stockholder of New Company and all others claiming through such stockholder, that the conservator, as sole stockholder, for himself and for any successors in ownership of said stock, agreed to consent and consented to such Plan of Mutualization as might be promulgated by the price determination

committee and to dispose of such stock at the price and upon the terms of payment provided for in such Plan of Mutualization.

Various provisions of the Rehabilitation and Reinsurance Agreement show that the agreement contemplated that the price determination committee could promulgate a Plan of Mutualization and fix the price and terms of payment for the stock prior to the full restoration of non-can benefits; and that in such case payment for the stock would be postponed until after restoration of non-can benefits had been completed. Inherent in the fact that the agreement contemplated such postponement of payment, is a further fact that the agreement contemplated that the Plan of Mutualization should not obligate New Company unconditionally to make the postponed payment.

Appeals were taken from Judge Willis's order of December 4, 1936, adjudicating the validity of the Rehabilitation and Reinsurance Agreement and the Supreme Court of California and the Supreme Court of the United States affirmed the order. (Carpenter v. Pacific Mut. Life Ins. Co., *supra.*)

The result of Judge Willis's order of December 4, 1936, was that New Company acquired valid title to substantially all of the assets of Old Company and the conservator acquired valid title to all of the capital stock of New Company, subject, however, to an option to the participating life policyholders of New Company, through mutualization proceedings initiated after approximately 10 years, to cause New Company to acquire such stock at the price and upon the terms fixed by a duly appointed price determination committee, in the event that such committee should determine that in its opinion mutualization was practicable. The option required that the mutualization proceedings should be conducted in accordance with the laws of the State of California.

On February 2, 1937, the court, in the conservatorship proceedings, ordered the liquidation of Old Company and appointed the Insurance Commissioner to liquidate it. The validity of this order was upheld on appeal. (Carpenter v. Pacific Mut. Life Ins. Co., 13 Cal. 2d 306 [89 P. 2d 637].)

Thus, the liquidator succeeded the conservator, as the owner of the stock of New Company, subject to the option in favor of the participating policyholders to cause the company to be mutualized.

On April 4, 1938, the liquidator transferred title to the capital stock of the New Company to voting trustees. This was done pursuant to the provisions of section 1037(e) of the Insurance Code. The validity of this transfer under the voting trust was upheld upon appeal. (Caminetti v. Pacific Mutual L. Ins. Co., 22 Cal. 2d 344 [139 P. 2d 908].)

Under the provisions of the voting trust, the trustees were given full legal title to the stock in order that they might exercise the rights of stockholders in the control of the corporation, and they were expressly obligated to carry out all of the provisions of the Rehabilitation and Reinsurance Agreement, including the covenant of the conservator, for himself and his successors in the ownership of the stock, to consent to any Plan of Mutualization promulgated by a duly appointed price determination committee.

Thus, the voting trustees held the stock of New Company subject to the option to mutualize contained in the Rehabilitation and Reinsurance Agreement. The voting trust provided that it should terminate upon adoption of a Plan of Mutualization in accordance with the laws of the State of California.

In 1946, approximately 10 years after the organization of New Company, the requisite percentage of participating

life policyholders requested the creation of an appointing committee to exercise the duties and functions provided for in the Rehabilitation and Reinsurance Agreement in respect of a proposed mutualization of New Company. The participating life policyholders, as permitted by the agreement, specified that the mutualization should be for the benefit of both participating and non-participating life policyholders. As of January 31, 1947, in accordance with the terms of said agreement, George Willard Smith, President of the Life Insurance Association of America (formerly the Association of Life Insurance Presidents), Doctor Donald B. Tresidder, President of Stanford University, and Doctor Clarence A. Dykstra, Provost of the University of California at Los Angeles, appointed a price determination committee consisting of Alva J. McAndless, Ray D. Murphy, Horace R. Bassford, and Albert J. Hettinger. Mr. McAndless was the President of Lincoln National Life Insurance Company of Fort Wayne, Indiana, a stock company, and the tenth largest life insurance company in the United States. He was a graduate of the University of Michigan and an actuary by profession. He was a past president of the American Institute of Actuaries (now called the Society of Actuaries) and a past president of the American Life Convention. He had been connected with Lincoln National Life Insurance Company since 1919 and had risen through the ranks, holding various positions and offices until he became president in 1939. He had had extensive experience in evaluating other life insurance companies through the acquisition of stock companies, either by way of acquiring their stock or their assets. Among the acquisitions with which he was familiar or in which he personally participated were acquisitions which Lincoln National Life Insurance Company made of Michigan State Life Insurance Company, Pioneer Life

Insurance Company, Merchants Life Insurance Company, Globe Life Insurance, American Life Insurance Company, Reinsurance Life Insurance Company, Old Line Life Insurance Company, Northern States Life Insurance Company, and Royal Union Life Insurance Company. In addition thereto, he had handled negotiations for the purchase of Illinois Life Insurance Company and Missouri State Life Insurance Company, but in those instances Lincoln National Life Insurance Company did not become the purchaser.

Mr. Murphy was the Vice President and Chief Actuary of the Equitable Life Assurance Society of the United States, one of the five largest life insurance companies in the country. He is a graduate of Harvard University and an actuary by profession. He had been with Equitable Life since 1913. He was a past president of the Actuarial Society of America. Since 1936 he had been responsible at Equitable Life for all valuations of life and accident and health contingencies, including noncancellable accident and health contracts. He was responsible at Equitable Life for mortality and morbidity investigations and for analysis of all sources of profits and losses, and for distribution of surplus based upon such analyses. His duty caused him to be involved in many studies and estimates of projected future profits and losses and the effect of future contingencies upon the operations of Equitable Life.

Mr. Bassford was Vice President and Chief Actuary of Metropolitan Life Insurance Company, the largest life insurance company in the United States. He was a graduate of Trinity College and had been associated with Metropolitan Life since 1915. He was a Vice President of the Actuarial Society of America. He had participated in the acquisition by Metropolitan Life of several life insurance companies, including Pittsburg Life and Trust Company, Niagara Life Insurance Company, and Golden Seal Asso-

ciation, in connection with which it was necessary for him to evaluate said companies.

Mr. Hettinger was a partner in the investment banking firm of Lazard Freres and Company. He was a graduate of Stanford University and received the degree of Doctor of Philosophy in Business Economics at Harvard University, where he served for a number of years as Professor of Business Economics in the Harvard Graduate School of Business Administration. As a member of the Harvard faculty he had supervised research work in the valuation of life insurance stocks, and during the same period acted as economist to the Governor of the Federal Reserve Bank of Boston. He became engaged in business in the investment field in 1926 and became a partner in Lazard Freres and Company in 1943. During his business life he had made a particular study of life insurance stocks and their values.

Following their appointment on January 31, 1947, the members of the price determination committee undertook to perform the duties and responsibilities entrusted to them. They employed as their actuary Joseph A. Christman, Associate Actuary of the Metropolitan Life Insurance Company of New York. He was a Fellow of the Actuarial Society of America and had served in the Actuarial Division of Metropolitan Life since 1926. In the performance of his duties for Metropolitan Life, approximately 600 employes worked under his supervision. Associated with him in the duties which he performed for the price determination committee were D. J. van Keuren and F. H. Byron, both employes of the Metropolitan Life and Fellows of the Actuarial Society of America. Mr. Christman and his colleagues had the assistance of numerous trained supervisory and clerical employes borrowed from Metropolitan Life and Equitable Life.

Commencing in 1947, the members of the price determination committee, with the assistance of Mr. Christman

and his associates, undertook a study of the past and anticipated future earnings of New Company, of the amount which would be required completely to restore non-can benefits, of the length of time which would be required to accomplish such restoration, and of the value of the stock of that company. Their study occupied a period of approximately three years and consumed approximately 10,000 hours of work. Mr. McAndless testified that the committee made "one of the most complete investigations of earning power that has ever been made for any life insurance company."

On April 4, 1950, the price determination committee rendered its report, stating that in its opinion mutualization of New Company was then practicable, determined the value of the stock as of December 31, 1948, and fixed the price to be paid for the stock of New Company at $3,000,000 plus interest on $3,000,000, from December 31, 1948, to date of payment, with certain provisions for its augmentation, and fixed the terms of payment.

The Plan of Mutualization provides for a special surplus fund, to be accumulated from 5 per cent of the net profits of the participating department on policies issued subsequent to July 22, 1936, and for a payment of the purchase price from this fund and from capital in general corporate surplus. The Plan of Mutualization filed by the committee as part of its report, provided that upon adoption of the plan, the Voting Trust Agreement of April 4, 1938, should terminate in accordance with the provisions of said voting trust and that the liquidator to whom the voting trustees were obligated to transfer the stock should immediately dispose of the stock of New Company by transferring it to trustees under a new voting trust, in accordance with the provisions of Insurance Code, Section 11529.5. It was expressly provided that nothing contained in the plan should affect the right of the

non-can policyholders to have applied to restoration of non-can benefits all of the corporate earnings of the company not reasonably required for the reasonable, proper and profitable conduct of the operations of New Company as a going concern, as provided in Paragraph 14 of the Rehabilitation and Reinsurance Agreement.

The plan further provided that in accordance with such agreement New Company should submit the plan to the policyholders entitled to vote thereon and that if 10 per cent of such policyholders should so request New Company should submit the plan for approval in accordance with the laws of the State of California.

The plan was submitted to the life policyholders and the requisite percentage requested its submission for approval in accordance with the laws of the State of California. In accordance with Section 11526 of the Insurance Code, New Company submitted the plan for the required approvals; on May 5, 1950, the board of directors of New Company adopted the Plan of Mutualization. Thereafter, a majority of the voting trustees under the Voting Trust Agreement of April 4, 1938, as owners and holders of the stock of New Company, and in accordance with the provisions of said Voting Trust Agreement, approved the Plan of Mutualization by executing their written consent thereto. Under the provisions of the Voting Trust Agreement the action of a majority of the trustees constituted action of all of the trustees.

On or about June 16, 1950, New Company submitted the Plan of Mutualization to the Insurance Commissioner and petitioned for the approval thereof. The Insurance Commissioner gave notice by publication and by mail that a hearing would be held on August 1, 1950, for the purpose of determining whether the Insurance Commissioner should approve the plan. Notice of the hearing was mailed, among others, to Old Company and to the

Pacific Mutual Stockholders Protective Committee. On August 1, 1950, the hearing commenced, and continued from day to day until and including August 18, 1950. All persons desiring to be heard were heard, including the Pacific Mutual Stockholders Protective Committee. Old Company did not avail itself of the opportunity to be heard. Evidence both oral and documentary was received, and was incorporated in a reporter's transcript of over 500 pages.

On September 22, 1950, the Insurance Commissioner issued a 22-page decision, in which he found that the Plan of Mutualization protected the rights and interests of New Company, its policyholders and its shareholders, and that the plan would be fair and equitable in its operation, and in which he issued his approval, thus permitting the plan to become effective if it should be approved by a majority vote of the life policyholders and should thereafter be filed in the office of the Insurance Commissioner. (Ins. Code, §11526.)

The life policyholders of New Company thereafter approved the Plan of Mutualization in accordance with Section 11526(d) of said Code.

On or about November 9, 1950, before the plan was filed in the office of the Insurance Commissioner, after having been adopted by a vote of the directors of New Company, and after having been approved by the written consent of the shareholders of New Company and by the Insurance Commissioner (but before its approval by the life policyholders of New Company) appellants filed their petition for writ of mandamus and obtained an order staying the operation of the Insurance Commissioner's approval of September 22, 1950, expressly permitting, however, a vote of the life policyholders in accordance with Section 11526(d) of the Insurance Code.

In accordance with the provisions of the Code of Civil Procedure, Section 1094.5, a hearing was held by the court below. All of the record of the proceedings before the Insurance Commissioner was filed with the court. Appellants, respondent Insurance Commissioner, and respondent New Company each filed lengthy briefs and lengthy arguments were made, which are reported in the Reporter's Transcript on Appeal. No evidence was received other than stipulations and the record before the Insurance Commissioner, consisting of the Reporter's Daily Transcript, the exhibits and the Insurance Commissioner's decision. On March 24, 1952, the judge of the court filed his memorandum of decision, and on June 2, 1952, he filed his findings of fact, conclusions of law and judgment, which are the subject matter of the appeal herein.

We will now proceed to a consideration of the law of the case. As above indicated, the principal points raised by appellants are two:

(1) The order made by the Insurance Commissioner was not justified by the evidence; and

(2) The order was made without jurisdiction.

We think neither claim is tenable and that the judgment of the lower court must be affirmed.

Point (1) may be rather quickly disposed of. After notice to all interested parties, a hearing, which took 13 days to complete, was had by the commissioner. Much evidence, both oral and documentary, was received by him. It is manifestly impossible to here set it forth at length. Suffice it to say we have examined it in detail, all of the volumes of the daily transcript of the evidence and the exhibits introduced, and we are not prepared to say that such evidence then taken and received was insufficient to justify the commissioner's ultimate conclusion that the

plan was fair and equitable to, and protected the rights and interests of, all interested parties, including the stockholder, in whose right the appellants sue.

On the contrary, much of the evidence was based upon thousands of hours of study and investigation by persons who appear to have been well qualified experts, and we are well satisfied the commissioner acted upon adequate evidence. Two members of the Price Determination Committee and one of the actuaries employed by the Price Determination Committee testified at length as to the manner in which, and the basis upon which, the committee arrived at the price to be paid by New Company for its stock when it consummated the proposed Plan of Mutualization. In substance they testified that they had, by long and exhaustive actuarial studies, determined the amount necessary to fully but gradually restore the benefits of the non-can policyholders; that they had then discounted these amounts at 3 per cent interest to their present value, and found that the present value of the amounts necessary for restoration was $22,000,000; that by similar studies they had established the probable earnings of New Company for each year, commencing with the year 1949 and extending to the year 2000; that by discounting the earnings for the years 1949 to 1974, both inclusive, at 3 per cent (only a portion of the earnings for the last year were so discounted), they determined that the company would be able to complete restoration of non-can benefits in the year 1974; that after the completion of restoration the stockholders of Old Company would be entitled to its earnings, and that the present value of these earnings from 1974 to perpetuity, discounted at 10 per cent, was $2,614,000; that by reason of the terms of the rehabilitation agreement it was necessary to add $500,000 to this amount, but that if certain risk elements had been disregarded, they thought it proper to deduct

the sum of approximately $100,000, giving a present value to the stock of $3,000,000; that the calculated earnings upon which their estimate of the time within which to complete restoration of non-can benefits could be made, and upon which they base the present value of future earnings, were net earnings, after provision for contingency reserves.

They also testified that in their opinion a buyer could be found who would be willing to presently pay $3,000,000 for the stock of New Company and await the right to participate in the earnings of New Company for 25 years; that the stock of large life insurance companies currently had sold at 4.3 to 7.8 times of their estimated earnings after the deduction of voluntary reserves; that if the estimated earnings of New Company from 1948 to perpetuity were discounted to their present value at 10 per cent, that value would be less than the amounts necessary for full restoration, and there would be nothing left for the stockholders; that if the present value of the stock were fixed by giving a value to the nonparticipating life insurance in force at $20 per thousand, the value of the stock would be less than the amount necessary for restoration, and that, in their considered opinion, the price of $3,000,000 was a fair one to be paid to the stockholders.

They also testified that because the payment of the present value of the stock as determined by them was not to be made immediately, but was to be deferred, they had provided for the payment of interest upon the $3,000,000 and instead of fixing a rate of interest had used the basis of the highest coupon rate paid on long term government bonds, as they thought that would be equal to the amount New Company could earn upon the deferred payment from year to year; that they recognized that if restoration was completed sooner than they estimated, that is, prior to 1974, this would give an added value to the

stock and that they believed $250,000 for each year by which the date of restoration preceded 1974, was a fair estimate of the increased value.

There was introduced into evidence the report of the actuaries who had made the studies upon which the cost of restoration of future earnings were based, and in which the method and the data used are set forth in detail; and much other direct and pertinent evidence.

Some point is made of the fact that some evidence available was not spread upon the record. In view of the foregoing, such is of no consequence. And, in any event, there is nothing in Section 1094.5, Code of Civil Procedure, or any other law we know of in proceedings such as this, which requires the spreading of detailed facts upon the record. (Popcorn Equipment Co. v. Page, 92 Cal. App. 2d 448, 451 [207 P. 2d 647]; *In re* Atlas Pipeline Corp., 39 F. Supp. 846, 848.) All that is required is that the commissioner's approval be supported by substantial evidence in the light of the whole record, and if such be the case, as we now hold it was, the court below and this court are bound thereby. (Thompson v. City of Long Beach, 41 Cal. 2d 235, 239-240 [259 P. 2d 649]; Rible v. Hughes, 24 Cal. 2d 437, 445 [150 P. 2d 455, 154 A. L. R. 137]; Housman v. Board of Medical Examiners, 84 Cal. App. 2d 308, 315 [190 P. 2d 653]; Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793, 800 [65 S. Ct. 982, 89 L. Ed. 1372, 1377, 157 A. L. R. 1081].)

Point (2). We shall now proceed to a consideration of the question of jurisdiction and related matters. We think it proper to first consider the issue of *res judicata*. In this respect the appellants contend that the order of December 4, 1936, approving the Rehabilitation and Reinsurance Agreement is not *res judicata* as to such agreement, nor is it *res judicata* as to the Plan of Mutualization.

As to the first contention, we are foreclosed from considering it for the Supreme Court has already decided the point contrary to appellants' claim. In Carpenter v. Pacific Mut. Life Ins. Co., 13 Cal. 2d 306, 309 [89 P. 2d 637], the court said: "The legality of the seizure and the lawfulness and propriety of the plan of rehabilitation have already been upheld by this court. (Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307 . . . affirmed with opinion, Neblett v. Carpenter, 305 U. S. 297 [. . . . 83 L. Ed. 182].)"

The California courts have quite uniformly held that when the validity of an agreement is adjudged in a prior proceeding, that issue is *res judicata,* even though a litigant in a later proceeding may urge some reason for its alleged invalidity which was not urged in the prior proceeding. (Price v. Sixth District Agricultural Assn., 201 Cal. 502, 509 [258 P. 387]; De Hart v. Allen, 26 Cal. 2d 829, 831 [161 P. 2d 453].)

In proceedings in which attacks have been made upon the validity of similar plans of rehabilitation after an adjudication of the validity of such plans, the courts have held the issue of validity to be *res judicata* as to all parties represented in the proceedings for the approval of such rehabilitation plan, as to persons in privity with such parties, and as to parties represented by them through class representation. (Thrower v. Kistler, 14 F. Supp. 217, 219, 221; National Surety Corp. v. Nantz, 262 Ky. 413 [90 S. W. 2d 385, 388].)

The fact that a series of orders were contemplated does not change the rule. One of a series of orders in a proceeding becomes *res judicata* if the order is appealable and not appealed from or if an appeal is taken and is affirmed on appeal. (Estate of Nolan, 145 Cal. 559, 561 [79 P. 428]; Baldwin v. Stewart, 218 Cal. 364, 367-368 [23 P.2d 283].)

The issue of the Rehabilitation and Reinsurance Agreement was fully litigated in an adversary proceeding, and not by default. We have examined the authorities cited by appellants in support of their contention in this regard and find that they are not, in our opinion, authority for that which we are now investigating.

Appellants urge that before approving the Plan of Mutualization as fair and equitable the Insurance Commissioner was in duty bound to determine the value of the New Company as a going concern by ascertaining its earning capacity and capitalizing the same at an appropriate rate on the basis of economic surveys and special studies of the relevant criteria. In this case it was not necessary, as a matter of law, to employ any one method of determining the value of the stock. Such stock could be evaluated either on the basis of the market value, capitalization (so-called going concern and investment value), or on the basis of the usual method of evaluating all the stock of an insurance company. (California Annual Conf. of M. E. Church v. Seitz, 74 Cal. 287, 296 [15 P. 839]; Rives-Strong Bldg., Inc. v. Bank of America, 50 Cal. App. 2d 810, 816 [123 P. 2d 942]; Bewick v. Mecham, 26 Cal. 2d 92, 94-98 [156 P. 2d 757, 157 A. L. R. 1277].) At any rate, the Price Determination Committee did determine the investment value (or going concern value) of the stock, on the basis of a capitalization of corporate earnings applicable to the stockholders' equity.

In estimating future earnings there appears to be no specific criteria to go by. As the United States Supreme Court has said: "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." (Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, 527 [61 S. Ct. 675, 85 L. Ed. 982, 994].) The pattern

of future earnings of the New Company having been fixed by the committee, upon sufficient evidence, we can see no objection to the plan adopted for capitalization. (Akron, Canton & Youngstown Ry. Co. v. Hagenbuch, 128 F. 2d 932, 939.)

The next point urged is that the Insurance Commissioner made no pretense of determining investment value in the manner required by law or otherwise; his order approving a Plan of Mutualization, therefore, was due to a mistake of law and must be reversed as arbitrary and constructively fraudulent. One answer to this is that the power and duty to determine the value and price of the stock was lodged in the Price Determination Committee and not in the Insurance Commissioner, by the Rehabilitation and Reinsurance Agreement, and this committee was thereby empowered to determine the price to be paid for the stock on any reasonable basis. The determination of value was made by the committee after considering several conventional and approved methods, and we are unable to hold, from the record, that the conclusion it arrived at was unreasonable.

Appellants complain that $3,000,000 was arbitrarily taken away from the stockholders by adding $3,000,000 to the estimated cost of restoration. We find this item to be fully explained in the Christman Report and in his testimony and we can find nothing arbitrary in his calculations. It is based on detailed study by actuaries.

In answer to appellants' contention to the contrary, we find it could well have been found, upon the evidence, that the Mutualization Plan did adequately protect the rights and interests of shareholders.

Appellants next contend that by approving Paragraph 20(f) of the Rehabilitation and Reinsurance Agreement, the court thereby reserved the jurisdiction to determine, at a future time, whether the provisions as to mutualization

in Paragraph 20 were contrary to law or illegal or void. We can see no merit in the contention. If the court had intended to reserve such power it would have said so. There is nothing in the order to that effect, and we should not and cannot read something into it that is not there. It is further urged that Paragraph 16 of Judge Willis's order of December 4, 1936, shows that the order is not *res judicata* as to the Rehabilitation and Reinsurance Agreement. The fact that the court therein reserved jurisdiction to make further orders in the premises, does not stultify, or set at naught, the order already made. This paragraph was obviously intended to permit the court to thereafter make whatever order it deemed proper, if any, to carry the order then being made along to fruition. (Cason v. Glass Bottle Blowers Assn., 37 Cal. 2d 134 [231 P. 2d 6].)

Passing now to the next contention of appellants, that the order of December 4, 1936, is not *res judicata* as to the Mutualization Plan proposed, we must, of course, agree, since the court could not then approve a plan which was not before it, nor, indeed, had it then been formulated; but what it did do was to approve the agreement in all of its details, and one of those details was to give the participating life policyholders the *right or option* to mutualize thereafter. The decreeing of this *right* is, therefore, *res judicata*. We are satisfied that the order we have been discussing has become *res judicata* as to all the matters determined therein.

We now pass to another point urged by appellants, and that is that sections 1043-1052 of the Insurance Code, and not sections 11526-11533, are applicable to the mutualization of the New Company.

In the first place, the rehabilitation agreement above referred to unquestionably makes sections 11525, etc., applicable to the mutualization of the New Company, and this agreement has been approved by the court, thus becoming

res judicata. In the second place, these sections (11526-11533) would have been applicable in any event, because the New Company is a solvent insurer and not one that has been seized by the commissioner. Paragraph 20(a) of the agreement approved by the court, provides machinery for the formation of a "voluntary mutualization of the New Company, in accordance with the laws of the State of California." Under such law a voluntary mutualization can be accomplished only under the provisions of section 11525, etc., of the Insurance Code and not under the provisions of section 1043, etc., thereof. This being the case, it would seem unnecessary to consider the other points raised by counsel in this regard, since to do so would merely be reconsidering something that has already been decided by the Supreme Court.

The contention is made that the court must disregard the corporate entity of the New Company and treat it as though it were the Old Company. This matter has already been decided contrary to such claim. (Garrison v. Pacific Mut. Life Ins. Co., 83 Cal. App. 2d 1, 9 [187 P. 2d 893].)

There is nothing in the Carpenter case, 10 Cal. 2d 307, *supra,* indicative of a thought that the two companies were one and the same, at least after December 4, 1936. The entity of a corporation cannot be disregarded unless it be alleged and proved that the organization thereof was fraudulent or prompted by dishonesty and that injustice would be done if the corporate entity were not disregarded, and that there has been a cessation of the individuality and separateness of the corporation and the owners of its stock. (Judelson v. American Metal Bearing Co., 89 Cal. App. 2d 256, 262-263 [200 P. 2d 836], and cases therein cited.) Nothing of such a nature herein appears. The New Company was not an agency of the Insurance Commissioner subsequent to December 4, 1936, but even if it was, obvi-

ously such would not make the New Company the same as the Old Company.

Next we consider the claim of appellants that the directors of the New Company had no knowledge of the data on which the Plan of Mutualization was based, and in purporting to adopt the plan, acted as rubber stamps. Section 11525 of the Insurance Code provides that a Plan for Mutualization of a solvent insurance company may be carried out "by complying with the requirements of this chapter." One requirement is that the plan shall be "adopted by a vote of a majority of the directors." It is conceded that this was done on May 5, 1950. No authority is cited for the proposition that directors' action, once taken, can be attacked on the ground of insufficient information, and there probably is none, for obvious reasons. In fact, the law is, no doubt, to the contrary. (6 Fletcher, Cyclopedia of Corporations, p. 296.) Furthermore, there is no merit in the statement that the directors were not adequately informed. Prior to April 13, 1950, each director had received a copy of the report of the Price Determination Committee and of the Plan of Mutualization. Furthermore, at its meeting on May 5, the Board received reports, heard the testimony of informed witnesses, all to the effect that the plan could be practically accomplished, having due regard to the interests of all persons interested in the New Company, that it was based on sound principles, was fair, just, equitable, financially feasible, and that the price to be paid and the terms of payment were reasonable and fair; all of which seems to be a complete answer to this point raised by appellants.

We now take up the claim that no valid approval of the Plan of Mutualization has ever been given on behalf of the stockholders, the consent purportedly given by the conservator in the Rehabilitation Agreement did not consti-

tute a valid approval of the present Plan of Mutualization, and the liquidator or conservator could not delegate his power to the Price Determination Committee. The facts of this case take it out of the general rules of law enunciated in the authorities cited by appellants. Here, the validity of the rehabilitation agreement, wherein the conservator, for himself and his successors in interest, as shareholder of the New Company, consented and agreed to consent to such Plan of Mutualization as might be promulgated by a duly appointed Price Determination Committee, is, as is all other parts of said agreement, *res judicata*.

Thus, the proposition is not where a trustee, having certain duties to perform, on his own initiative delegates his authority or duties to another; rather is it a case where he is bound, both by contract and decree, to consent to what another may do. He could not have refused to give his consent, had he wanted to, under the facts in this case.

We in no way intend to detract from the force of the foregoing conclusion in adding that agreements in which obligations depend on fact determinations thereafter to be made by third persons are valid and not unusual. There are many cases so holding. Illustrative thereof are: Bewick v. Meacham, 26 Cal. 2d 92, 97 [156 P. 2d 757, 157 A. L. R. 1277]; American-Hawaiian Engineering & Const. Co. v. Butler, 165 Cal. 497, 513 [133 P. 280, Ann. Cas. 1916C 44]; Roberts v. Security T. & S. Bank, 196 Cal. 557, 568 [238 P. 673]; Silva v. Mercier, 33 Cal. 2d 704, 708-709 [204 P. 2d 609]; Market Street Ry. Co. v. Hellman, 109 Cal. 571 [42 P. 225]; 3 Williston on Contracts, page 2247, section 800.

Another contention of the appellants is that the conservator or liquidator could not give his approval as trustee for the shareholders until after the adoption of the

Plan of Mutualization by a vote of a majority of the board of directors, they specifically saying that the steps required to mutualize a solvent or delinquent corporation must be taken in the order enumerated in section 11526. We cannot agree. The section could easily have so provided, but it does not, except in subdivision (e) thereof, and we are not permitted to judicially legislate.

Also, if there could be any question about it, the fact that the language appearing in subdivision (e) is not made to apply to subdivisions (a), (b), (c), or (d) is strongly persuasive that the Legislature did not intend that such provisions should apply to these other subdivisions. (Market Street Ry. Co. v. Hellman, 109 Cal. 571, 587 [42 P. 225]; Estate of Bull, 153 Cal. 715, 717 [96 P. 366]; In re Sekuguchi, 123 Cal. App. 537, 538 [11 P. 2d 655]; 23 Cal. Jur. 762.) At any rate, if the liquidator was the stockholder whose consent was required, his consent will be deemed to have been given at the proper time, because being bound by the conservator's agreement to consent, equity will regard that as done which should have been done. (Civ. Code, § 3529; Poultry Producers of Central Calif. v. Nilsson, 197 Cal. 245, 254 [239 P. 1086].) It is wholly proper that substance should prevail over mere form.

Appellants complain that the Insurance Commissioner, prior to approving the Plan of Mutualization, did not conduct the type of hearing required by section 11527 of the Insurance Code. This is based principally upon the claim that the Insurance Commissioner did not have, or receive, proper evidence to justify his conclusion which approved the Mutualization Plan. The basic problem for the commissioner to determine was whether or not the price and terms of payment for the New Company stock were fixed in accordance with the rehabilitation agreement, for if they were, the Plan of Mutualization is fair and equitable

because it gives the stockholder the price and terms he agreed to take.

The point is made that some of the witnesses who testified before the commissioner were interested witnesses. Such claim could go only to the weight of the evidence and not its admissibility. It does not appear here, in any event, that any evidence received by him was not trustworthy, nor that any committeeman or valuer or any witness was guilty of partiality, bad faith, or misconduct in their appraisals or testimony. Therefore, the point cannot be upheld. (Cecil v. Bank of America, 107 Cal. App. 2d 38 [236 P. 2d 408]; Riccomini v. Pierucci, 54 Cal. App. 606, 608 [202 P. 344].)

Another point raised by the appellants is that they have been deprived of substantive due process because the stock of the New Company was valued as of the present, that the time of payment was fixed long in the future, payment was conditional, there was no provision for reasonable interest, and the price paid was grossly inadequate. On this question of due process we should never lose sight of the fact that the commissioner's approval of the Plan of Mutualization did not have the effect of taking appellants' property, since it was nothing more or less than a permit and did not compel the life policyholders to approve the plan, nor the stockholder to dispose of the stock as therein provided, or the New Company to adopt the plan. Even after the commissioner's approval the life policyholders could have rejected the plan, had they so desired. The stockholder could have rejected the plan but for the Rehabilitation and Reinsurance Agreement, which obligated the stockholder to dispose of the stock at the price and upon the terms fixed by the Price Determination Committee. The compulsion upon the stockholder flows from the obligations of the Rehabilitation and Reinsurance Agreement and not from the commissioner's approval of the

plan. Even if this were not so, we do not believe the point raised is sound. As we read the evidence it does not necessarily lead to that conclusion; in fact, it could well lead to a contrary conclusion, the one that was adopted by the Insurance Commissioner and upheld by the lower court, to wit, that the plan was fair and equitable.

This already lengthy opinion must come to a conclusion. We have carefully read the briefs of all parties and each point raised by the appellants. Those not hereinabove discussed, we find to be without substantial merit.

The record shows that the commissioner's order approving the Mutualization Plan was not improper, on the evidence submitted. As above indicated, the liquidator was bound by the rehabilitation agreement to dispose of the stock of the New Company on the terms fixed by the committee. Petitioners were parties to the proceeding in which the rehabilitation agreement was proposed, and their representatives participated in seeking that approval. They may not now complain of its terms.

The evidence before the commissioner was fully documented with respect to all factual data, the witnesses who testified appear to be outstanding in their fields, and their expert judgment on questions of valuation and valuation methods, interest rates and trends, and all other matters within the province of expert opinion, could not be disregarded on the basis of "mere unsupported suggestions and opinions as counsel." In that situation the commissioner could clearly have come to the conclusion that the plan should be approved.

We have studied this case diligently in an effort to ascertain if there was error committed in the court below. We can find none of any consequence.

The oral argument of this case was regularly set for hearing by this court for February 10, 1954. On February

1, 1954, the parties hereto signed, and on February 8, 1954, filed herein a stipulation waiving oral argument and agreeing that the case "may be submitted for decision upon the briefs and record on file." On February 10, 1954, appellants appeared before the court and made an *ex parte* application to have the court consider a purported agreement between Old Company and one Clint W. Murchison, wherein the latter agreed, subject to a number of highly important contingencies, to pay $17,000,000 for stock in Old Company.

Various briefs have been filed herein, mostly by *amici curiae,* respectively approving and opposing such application. We have concluded we may not give consideration to such agreement. (Redsted v. Weiss, 71 Cal. App. 2d 660, 666 [163 P. 2d 105]; Bassett v. Johnson, 94 Cal. App. 2d 807, 812 [211 P. 2d 939].)

If we were to give full consideration to the offer, as made, we would be in no position to hold that the Insurance Commissioner erred in his conclusions, since such evidence could, at the most, to be merely cumulative. (Katenkamp v. Union Realty Co., 36 Cal. App. 2d 602, 621-622 [98 P. 2d 239].)

And, in any event, such additional evidence obviously would not be "so conclusive that it compels the direction of a judgment in favor of appellant," nor would its effect upon this appeal be "decisive." (Bassett v. Johnson, *supra.*)

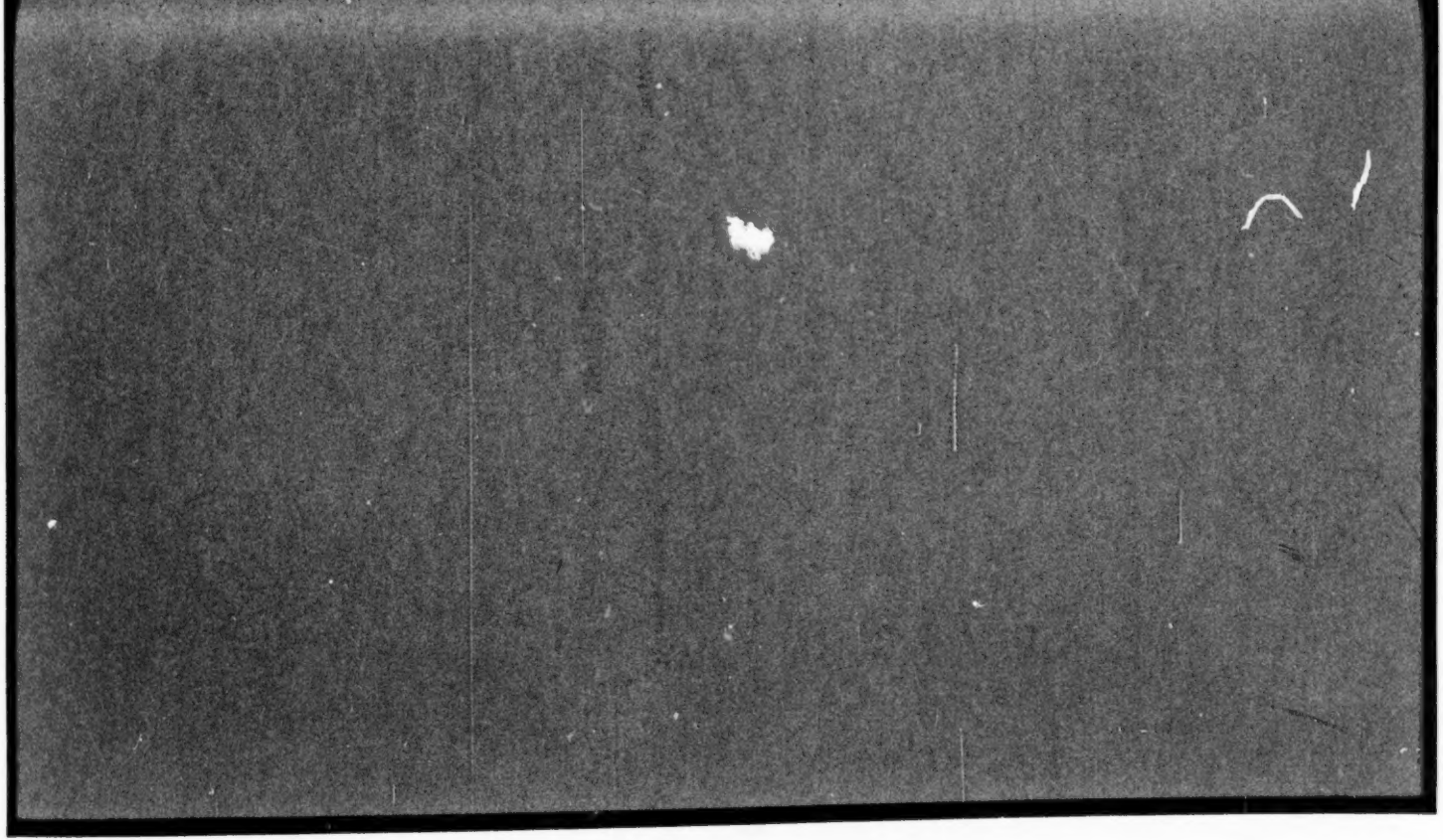
While the last 18 years' history of this company is no proof thereof, nevertheless, it is a well recognized principle that all litigation must sometime come to an end.

The judgment of the lower court must be, and is, affirmed.

Dooling, J., and Kaufman, J., concurred.

APPENDIX C

Opinion of the Superior Court for Los Angeles County



APPENDIX C

Opinion of the Superior Court for Los Angeles County

In the Superior Court of the State of California in and for the County of Los Angeles.

The Pacific Mutual Life Insurance Company of California, etc., et al., petitioners, vs. Wallace K. Downey, etc., et al., respondents. No. 579,832.

Filed March 24, 1952.

Memorandum of Decision

By this proceeding petitioners seek to review and set aside the order of the Insurance Commissioner approving a plan of mutualization of Pacific Mutual Life Insurance Company (hereinafter called New Company).

The factual and historical background, so far as is necessary to understand the numerous questions raised by petitioners, is as follows:

In 1936 Pacific Mutual Life Insurance Company of California, hereinafter referred to as Old Company, became insolvent. In July of 1936 the Insurance Commissioner, in accordance with the provisions of Section 1011 of the Insurance Code, filed an application for an order appointing him Conservator of Old Company. Pursuant to this application an order was made appointing the Commissioner as Conservator of Old Company, and vesting in him title to all the assets of that Company.

At the same time the court made an order which, among other things, authorized the organization of New Company, a respondent herein. In accordance with the order, the Commissioner organized New Company and transferred to it substantially all of the assets of Old Company, and received all of the stock of New Company, subject to the provisions of a rehabilitation agreement, which had been approved by the order last above mentioned.

It was thereafter found that Judge Edmonds, who had signed the order heretofore mentioned, was a policyholder in Old Company and was, therefore, disqualified, and that the orders he had made were void.

Thereafter a new application was made for the appointment of the Insurance Commissioner as Conservator, and this was heard by Judge Willis, and granted. Thereafter, upon notice, Judge Willis approved a rehabilitation agreement between New Company and the Insurance Commissioner as Conservator of Old Company. This agreement is in evidence in the present proceeding as Exhibit 9-A, and is hereinafter referred to as "Rehab" or "Rehab agreement".

In substance, insofar as the provisions thereof are pertinent in the present proceeding, the agreement provides that the Conservator should convey and assign to New Company all of the assets of Old Company, with certain exceptions; that New Company would reinsure the liability of Old Company and the Conservator under all insurance contracts issued by Old Company, except policies known as "non-can policies", which were policies of disability insurance issued by Old Company under which it had no right of cancellation so long as premiums were paid by the insured; that New Company would reinsure and assume the liability of Old Company and of the Conservator on all non-can policies, but at reduced amounts, varying from 20 per cent of the amounts payable under the face of the policy to 90 per cent of the amounts so payable; that if the Commissioner was appointed Liquidator of Old Company, New Company would pay to him an amount equal to the claims filed with and established against the Liquidator by such policyholders of Old Company as did not elect to accept reinsurance in New Company.

By paragraph 14 of Rehab it was agreed that New Company should, from time to time, transfer, from the

funds of New Company available for its general corporate purposes, to a special fund such amounts as New Company's board of directors should determine to be not reasonably required for the reasonable and proper conduct of the operation of New Company, and that the Commissioner, at the time of any examination of New Company by him, might require the transfer of additional funds to such special fund.

It was further provided that the moneys and assets from time to time placed in said special fund should be used by New Company to restore to the holders of non-can policies entitled thereto, benefits in excess of the amounts which were reinsured by New Company, to the end that the benefits "originally provided in said non-can policies as written may eventually be fully paid . . . with interest on deferred restoration payments . . . at the rate of three and one-half per cent . . ."

By paragraph 19 of Rehab it is provided that the Conservator or Liquidator should proceed in such manner and at such time as he thought proper, "subject to the provisions of paragraph 20 hereof", to realize upon the assets held by him; that the proceeds realized from the sale of any assets, other than assets received for the benefit of policyholders of Old Company who had rejected reinsurance by New Company, should be used by the Liquidator for the payment of any of his costs and expenses of administration and claims having preference in liquidation.

As to the balance of the amounts so realized, the agreement provides in part as follows:

> "(b) In the event benefits under Non-Can Policies shall not theretofore have been fully restored as provided in paragraph 14 hereof, a portion of the remaining proceeds (but not exceeding the amount required to provide complete restoration of the benefits under Non-Can Policies), in the ratio

which exists between the Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof) whose holders have accepted reinsurance hereunder, and all Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof), whether their holders have accepted reinsurance, or have rejected reinsurance hereunder, and have filed claims in the liquidation proceedings shall be paid to the New Company, and by it transferred to the special fund described in paragraph 14 hereof. . . .

"(c) Any portion of such proceeds remaining after making the payments described in subparagraphs (a) and (b) hereof shall be used to pay and discharge claims filed with the Liquidator and finally allowed.

"(d) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b), and (c) hereof shall be paid to the New Company for the purposes of the special fund described in paragraph 14 hereof, to the extent the same may be required to provide full restoration of the benefits under Non-Can Policies.

"(e) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b), (c), and (d) hereof shall be disposed of by the Liquidator in the manner provided by law."

Paragraph 20 of the agreement provides that neither the Conservator nor the Liquidator should dispose of any of the stock of New Company held by him, except in one of the manners provided for in said paragraph. It was then provided that at any time "between July 1, 1946, and January

1, 1948, and thereafter so long as the Conservator or a Liquidator of the Old Company may continue to hold any or all of said stock", 10 per cent of the holders of participating policies of life insurance might request New Company to create an appointing committee, which should consist of the holders of certain named designated offices, and that this appointing committee should then designate "a Price Determination Committee of not less than three and not more than five persons skilled in matters of insurance company valuation, which committee . . . shall determine whether in their opinion the proposed voluntary mutualization of the New Company . . . *can then be practicably accomplished, having due regard to the interests of all persons interested in the New Company.* If it be determined that such mutualization is not then practicable no further steps shall be taken in connection with a *possible mutualization* of the New Company under the provisions of this subparagraph until at least six months after the date of such determination."

It then provides that if in the opinion of the Price Determination Committee "mutualization is *then practicable,*" the Committee shall determine "the price to be paid upon such mutualization and appropriate terms of payment thereof", but that said determination should not be made prior to January 1, 1947.

The agreement then, after specifying certain items that should be taken into consideration by the Committee in determining the price to be paid, provides that the Committee shall, in its report to New Company, include a plan of mutualization of New Company, which plan should, in addition to any other relevant matters, specify "the price to be paid, the terms of payment, the persons by whom and the manner in which the right to vote the stock in New Company is to be exercised *pending complete* payment of the purchase price;" that the Committee "may provide in the

plan for the creation of a voting trust . . . designate the initial voting trustees and make provision for the appointment of their successors. Unless the benefits under Non-Can Policies have theretofore been fully restored and claims against the Liquidator fully paid, such plan shall further provide that such mutualization shall not affect the provisions of paragraph *17* or of paragraph *14* hereof, or the right of holders of Non-Can policies to the restoration of benefits from the sources and in the manner therein provided."

The agreement then requires that New Company, upon the request of 10 per cent of its policyholders entitled to vote, shall submit the plan "in accordance with the laws of the State of California then in effect." It then proceeds: "The Conservator for himself and for any successors in the ownership of said stock claiming under him in any manner other than through a sale of said stock pursuant to the provisions of subparagraph (d) *hereof agrees to consent and hereby consents* as the holder and owner of the stock of the New Company to such plan of mutualization. In the event said mutualization plan *is adopted* . . . Liquidator . . . *shall dispose* of such stock in accordance with such plan."

The agreement then gives to the Price Determination Committee, if appointed prior to January 1, 1948, the power to extend the time "within which mutualization may be effected hereunder for such period or periods of time as it may deem necessary for the orderly completion of mutualization proceedings as herein provided."

Subparagraph (b) of paragraph 20 provides a method of effecting a merger, consolidation, reorganization, or reinsurance of New Company, free from the effect of subparagraph (a) as to mutualization.

Subparagraph (c) gives Old Company the right, subject to the approval by the Court, to purchase from the

Liquidator the shares of stock of New Company held by him, by paying to the Liquidator an amount sufficient to complete restoration of Non-Can benefits and the payment of all claims against and liabilities of the Liquidator, subject, however, to the rights of policyholders as to mutualization if such payment be made prior to January 1, 1948.

Subparagraph (f) provides as follows:

> "(f) If the provisions of this paragraph 20, or of any one or more of the subparagraphs hereof, should be contrary to law or illegal or void, then such paragraph, subparagraph, or subparagraphs, shall be null and void, and shall be deemed separable from the remaining covenants and agreements in this agreement contained; and shall in no way affect the validity of any of the remaining provisions of this agreement."

In addition to approving the Rehab agreement and authorizing its execution by the Conservator, the order made by Judge Willis decreed that adequate provision is made by the Rehab agreement for each and every class of policyholder, creditor, and stockholder of Old Company, and "that neither said agreement nor the plan therein embodied" discriminated unfairly or illegally in favor of any policyholder, creditor, stockholder, or other person interested in Old Company, its property or assets, and that the "agreement and the plan therein embodied" and each did fairly and equitably protect and adjust the rights, obligations and liabilities of all persons concerned; that the Rehab agreement afforded "a feasible method of providing within a reasonable time full restoration of the benefits under the non-cancellable income policies" of Old Company.

By the order the Conservator was authorized "without further order of this court" fully and faithfully to perform all of the obligations and terms and conditions and

covenants on his part to be performed under the terms of Rehab agreement.

Paragraph 16 of the order provides:

> "That this court, without re.inquishing by these specific provisions any jurisdiction by it retained as a matter of law, do, and it does hereby, specifically retain and reserve jurisdiction of the within proceedings for the purpose of authorizing or approving any act of the Insurance Commissioner of the State of California done, or to be done pursuant to or in accordance with this order, and for the purpose of making or entering, upon application of the Insurance Commissioner of the State of California or of Pacific Mutual Life Insurance Company, any order, decree judgment, or ruling required, permitted, or requested to be done, made, or entered in connection with or pursuant to the terms of said agreement, or for the effectuation of the purposes thereof."

By paragraph 19 the Conservator and New Company were authorized to do all things necessary, desirable or proper to carry out the terms of Rehab or to effectuate its purposes.

From this order certain policyholders of Old Company appealed, and on the appeal the order was affirmed. (See *Carpenter* v. *Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307).

In 1937 an order was made directing the Insurance Commissioner to wind up and liquidate the business of Old Company and appointing him Liquidator. From this order an appeal was taken by certain policyholders, and on the appeal the order was affirmed. (See *Carpenter* v. *Pacific Mutual Life Ins. Co.*, 13 Cal. 2d 306.)

In 1938 the Liquidator transferred the stock of New Company to five voting trustees, pursuant to the provisions

of Section 1037(e) of the Insurance Code enacted in 1937. Thereafter the Insurance Commissioner and certain policyholders sought orders directing the New Company and the voting trustees to retransfer the stock to the Liquidator upon the grounds that the transfer to the voting trust was invalid. From the order denying these applications an appeal was taken, and on this appeal the order of the Superior Court denying the relief sought was affirmed. (*Caminetti* v. *Pacific Mutual Life Ins. Co.*, 22 Cal. 2d 344.)

Since 1936 all claims of policyholders who did not elect to accept reinsurance in New Company have been paid the principal amount of their claim without interest, but still claim interest against the Liquidator (their claim for interest as against New Company having been denied) to an amount of approximately $500,000. In said period New Company has restored to the holders of Non-Can policies which were reinsured by New Company 36 per cent of the amount by which the policies had been written down on reinsurance.

In 1946 New Company, in compliance with a request made by its policyholders, pursuant to paragraph 20 (a) of Rehab, created an appointing committee, and in January, 1947 the appointing committee created a Price Determination Committee composed of Horace R. Bosforth, Albert J. Hettinger, Jr., Ray D. Murphy, and Alva J. McAndless.

In April, 1950 the Price Determination Committee made its report to New Company. By this report they stated that they answered in the affirmative the question "whether in their opinion the proposed voluntary mutualization of New Company . . . can then be practicably accomplished, having due regard to the interest of all persons interested in the New Company," and attached as a part of their report a plan of mutualization of New Company.

Thereafter the Board of Directors of New Company passed a resolution adopting the plan submitted by the Price

Determination Committee, and the voting trustees, without examination into or passing upon the merits of the plan or the sufficiency of the price to be paid by New Company for its stock, approved the plan. The plan was not, after its submission by the Price Determination Committee, approved by the Liquidator.

New Company submitted the plan to the Insurance Commissioner for approval, and after an extended hearing the Commissioner made his order approving the plan, and found that it protected the rights and interests of New Company, its policyholders and shareholders, and that it would be fair and equitable in its operation. It is this order which the petitioners, who are Old Company, and a committee of its stockholders, seek by this proceeding to review.

It may be noted here that none of the policyholders of New Company, nor any of the persons who hold claims against the Liquidator for interest, are parties to the proceedings in this court, or complain of the plan or the order of the Commissioner.

In substance, the plan submitted by the committee and approved by the Commissioner provides that the shares of New Company now held by the statutory voting trustees shall be immediately transferred to nine voting trustees, named in the plan (including the Insurance Commissioner), to be held by them subject to the terms and provisions set forth in the voting trust agreement, a form of which is annexed to and made a part of the plan; that the price to be paid by New Company for its shares is 3 million dollars, with simple interest at an annual rate equal to the highest coupon rate of United States Government bonds at the furthest maturity outstanding at the close of the preceding calendar year, plus $250,000 for each full calendar year by which the date of complete restoration of Non-Can benefits antedates December 31, 1973.

That this sum shall be paid by New Company at such time as, (a) the benefits to all Non-Can policies reinsured by New Company shall have been completely restored; (b) the funds standing in a special surplus fund to be created, plus the capital and surplus standing in general corporate accounts, equal or exceed the price of the shares, with interest as specified above; (c) that the financial condition of the Company is such that, after paying for the shares, it shall have admitted assets in excess of its liabilities equal to the amount of four per cent of all of its admitted assets, plus 25 per cent of the premiums collected during the preceding calendar year on all group insurance written on a one-year term basis and all accident and health insurance.

That there is to be set aside in a special fund, to be used in part payment of the purchase price, 5 per cent of the net profits of the Participating Department of New Company.

That in the event the price of the shares shall not have been paid by December 31, 1983, the plan shall be considered to have failed, and the voting trust shall terminate, the shares be returned to the Liquidator, and the amount standing in the special fund shall revert to the general surplus of the Participating Department of New Company.

It will serve no useful purpose to set forth here a synopsis of all of the evidence received before the Commissioner, but it is necessary to state the substance of a portion of that evidence, in order that certain questions raised, and my ruling thereon, may be clear.

Two members of the Price Determination Committee and one of the actuaries employed by the Price Determination Committee testified at length as to the manner in which, and the basis upon which, the committee arrived at the price to be paid by New Company for its stock when it consummated the proposed plan of mutualization. In

substance they testified that they had, by long and exhaustive actuarial studies, determined the amount necessary to fully but gradually restore the benefits of the Non-Can policyholders; that they had then discounted these amounts at 3 per cent interest to their present value, and found that the present value of the amounts necessary for restoration was 22 million dollars; that by similar studies they had established the probable earnings of New Company for each year, commencing with the year 1949 and extending to the year 2000; that by discounting the earnings for the years 1949 to 1974 (both inclusive) at 3 per cent (only a portion of the earnings for the last year were so discounted), they determined that the Company would be able to complete restoration of Non-Can benefits in the year 1974; that after the completion of restoration the stockholders of Old Company would be entitled to its earnings, and that the present value of these earnings from 1974 to perpetuity, discounted at 10 per cent, was $2,614,000; that by reason of the terms of the rehabilitation agreement it was necessary to add $500,000 to this amount, but that as certain risk elements had been disregarded, they thought it proper to deduct the sum of approximately $100,000, giving a present value to the stock of 3 million dollars; that the calculated earnings upon which their estimate of the time within which to complete restoration of Non-Can benefits could be made, and upon which they based the present value of future earnings, were net earnings, after provision for contingency reserves.

They further testified that in their opinion a buyer could be found who would be willing to presently pay 3 million dollars for the stock of New Company and await the right to participate in the earnings of New Company for 25 years; that the stock of large life insurance companies currently sold at 4.3 to 7.8 times of their estimated earnings after the deduction of voluntary reserves; that if the estimated earnings of New Company from 1948 to

perpetuity were discounted to their present value at 10 per cent, that value would be less than the amounts necessary for full restoration, and there would be nothing left for the stockholders; that if the present value of the stock were fixed by giving a value to the nonparticipating life insurance in force at 20 dollars per thousand, the value of the stock would be less than the amount necessary for restoration, and that, in their considered opinion, the price of 3 million dollars was a fair one to be paid to the stockholders.

They further testified that because the payment of the present value of the stock as determined by them was not to be made immediately, but was to be deferred, that they had provided for the payment of interest upon the 3 million dollars, and instead of fixing a rate of interest had used the basis of the highest coupon rate paid on long-term Government bonds, as they thought that would be equal to the amount New Company could earn upon the deferred payment from year to year; that they recognized that if restoration was completed sooner than they estimated, that is, prior to 1974, this would give an added value to the stock, and that they believed $250,000 for each year by which the date of restoration preceded 1974, was a fair estimate of the increased value.

There was introduced into evidence the report of the actuaries who had made the studies upon which the cost of restoration and future earnings were based, and in which the method and the data used are set forth in detail. (Exh. 28).

Petitioners attack the order of the Commissioner and the plan of mutualization from many angles, but before passing on points made by them, there are certain questions which, to a large extent, underlie most of the points raised by them, and which must first be disposed of.

At all times we must keep in mind the nature of this proceeding. I have heretofore ruled, and again rule, that

in this proceeding the court is not entitled to exercise its independent judgment as to any issue of fact, but must affirm the order of the Commissioner and deny the peremptory writ of mandate sought by the petition, if the Commissioner had jurisdiction, if there was a full and fair hearing before him, held in the manner fixed by statute, and if, viewed in the light of the whole record, his order is supported by substantial evidence.

Petitioners contend that before the Commissioner would have jurisdiction to hold a hearing or to make any order, the plan of mutualization submitted to him must first have been adopted by the Board of Directors of New Company and consented to by the Liquidator as the beneficial owner of all of the shares of New Company.

Respondents contend that these are not essential to the jurisdiction of the Commissioner, and that the Commissioner may make an order approving of the plan before it is adopted by the Board of Directors of New Company, or before any assent to it is given by the shareholders.

Commissioner's power to act is purely statutory, and he did not have the power to make the order here under review unless the statute, Section 11526 of the Insurance Code, was substantially complied with. That section specifies four steps that must be taken in the adoption of a plan of mutualization. They are: (a) Adoption by a vote of the majority of the directors of the corporation to be mutualized; (b) Approval by a vote of the majority of the outstanding shares of the corporation, or the written consent of such shareholders; (c) Submission to and approval by the Commissioner; (d) Approval by a majority vote of all the policyholders of the class or classes for whose benefit the stock is to be acquired and who cast their vote; (e) Filing in the office of the Insurance Commissioner after steps (b), (c), and (d) have been taken.

I am of the opinion that the Legislature intended that the steps set forth should be taken in the order named, and

this is the construction placed on the plan by the Commissioner and by respondents prior to the sufficiency of the consent by the shareholder having been raised in this proceeding. (As to the Commissioner's construction of the statute, see Transcript, Volume I, page 3.)

If any other construction is placed upon the section, it would serve no purpose. Until a plan is adopted by the corporation, there is nothing for the stockholders to vote upon. Until a majority of the stockholders have approved a plan submitted by the corporation, there is no plan which could be submitted to the Commissioner. If a plan were promulgated by the Company and then taken to the Commissioner and, after he had acted so as to approve the plan, the shareholders refused to approve, the Commissioner's action would have been futile and useless, and it would be necessary for him again to pass on a plan to which a requisite number of shareholders had agreed. If the plan were first submitted to the policyholders and then to the Commissioner, and later either the directors or the shareholders refused to approve, again his action would have been useless.

Certainly this section contemplates that there must be some agreement between the parties who will be bound by the plan, if it be approved, before the Commissioner is called upon or authorized to approve or reject it. I hold, therefore, that unless under the facts shown by the record, the shareholder did approve the plan prior to its submission to the Commissioner, he was without jurisdiction to act thereon.

Petitioners contend that the order made by Judge Willis in the liquidation proceeding is not a final order, and is, therefore, not res judicata, but that that order and the Rehab agreement are both subject to collateral attack in this proceeding.

The point is not well taken. The proceeding in which the order was made (to which I have referred and will refer to as "liquidation proceeding") was one authorized and had under Section 1043 of the Insurance Code. It was not an ex parte proceeding, but an adversary one. It was upon notice, and Old Company, one of the petitioners herein, and certain of its stockholders, appeared.

In that proceeding, Conservator, by his petition, sought authorization from the court to execute the Rehab agreement and directly tendered the issue as to the validity of that agreement, and each of its terms and conditions.

The order not only approved the agreement and authorized its execution by the Conservator, but directly adjudged its validity and fairness.

Every attack made by petitioners here upon the Rehab agreement and the order approving it could have been made in the liquidation proceeding.

The proceedings had under Section 1043 of the Insurance Code is the method provided by statute for securing an adjudication of the validity of a plan for rehabilitation. The order made approving such plan is a final, not an interlocutory order. Until the order is made the plan is not a binding agreement. When it is made, the plan becomes an effective agreement between the parties. An order approving the plan gives life to it. An order rejecting a plan kills it. The proceedings and the order made were not preliminary. They were the final step taken by the Conservator in rehabilitating the business of Old Company.

I hold, therefore, that neither the validity of the plan nor of the order approving it may be attacked in this proceeding. In view of this, it is unnecessary to pass upon many questions raised by the parties here.

Petitioners contend that inasmuch as Rehab did not set up a plan of mutualization, the court by that order did not

pass upon the question as to whether or not the present plan of mutualization approved by the Commissioner was feasible, reasonable, fair, or equitable.

It is quite true that the court in the liquidation proceeding did not act or pass upon any plan of mutualization. The court in the liquidation proceeding did not have, and has not now, jurisdiction of mutualization proceedings. That jurisdiction is vested in the Commissioner, subject to limited review in this proceeding. The court in the liquidation proceeding did have jurisdiction to pass upon the validity of the plan of rehabilitation set forth in the agreement before it, and the provisions of Section 20 of that agreement are an integral part of the plan that it approved and found valid.

Petitioners further contend that the court in the liquidation proceeding did not determine the validity of Section 20 because of the severability of clause (subparagraph (f) of that paragraph) which has been heretofore quoted. They assert that the provisions of subparagraph (f) of paragraph 20—that if any paragraph or subparagraph should be "contrary to law or illegal or void", then said paragraph or subparagraph should be deemed separable from the remaining covenants and in no wise affect the validity thereof—as the grant of a continuing right to any interested person to at any time attack the legality of paragraph 20 or any proceedings had thereunder. They assert that as the order of Judge Willis approved all of the terms and conditions of the rehabilitation agreement, it approved subparagraph (f) and therefore continued it in effect.

I think they misconstrued the purpose of subparagraph (f). The purpose thereof was undoubtedly to enable the court in the proceeding had for the approval of Rehab either to approve the plan as a whole, or if it believed certain portions of paragraph 20 to be illegal, then to approve it with those parts deleted. In other words, the petitioners

there said to that court: "We ask you to approve this agreement as a whole, but if you cannot give your approval to it as a whole, we ask you to approve it, after deleting therefrom such portions of paragraph 20 as you find contrary to law."

They thus submitted to the court by their petition the validity of all of the terms and conditions of paragraph 20, and when the court gave its approval of the agreement, without finding any provision of paragraph 20 to be contrary to law, it, by its judgment, established the validity of each of the provisions of that paragraph, and it became an integral part of the approved agreement; subparagraph (f) had then served its purpose.

Petitioners next contend that by paragraph 16 of its order approving the rehabilitation agreement, the court reserved the right to pass upon any plan of mutualization which might be thereafter submitted pursuant to paragraph 20 of Rehab and upon the fairness of the price to be paid for the stock of New Company under such plan.

The court in the liquidation proceedings had no jurisdiction, and does not now have jurisdiction to pass upon any plan of mutualization. That jurisdiction is given by statute to the Commissioner of Insurance. The court in the liquidation proceeding, however, did have jurisdiction and was required to approve or withhold approval of any plan of rehabilitation, and it had jurisdiction to approve any transaction affecting assets in the hands of the Conservator or Liquidator. Its jurisdiction and its duties as to the rehabilitation agreement are fixed by Section 1043 of the Insurance Code. Its jurisdiction and its duty as to transactions involving assets in the hands of the Conservator are fixed by subdivision (d) of Section 1037 of the Insurance Code.

I think it is apparent that the court did not reserve jurisdiction to pass upon the feasibility, fairness, justness or equitableness of any future plan of mutualization presented in accordance with paragraph 20, or to pass upon the fairness of the price fixed by such agreement, but that it actually exercised its jurisdiction by approving Rehab agreement.

It must be remembered that inasmuch as the orders of Judge Edmonds were void, the Conservator's title to the stock of New Company was not vested until Rehab was approved and executed.

Paragraph 20 was an integral part of the rehabilitation agreement, and when that agreement was approved and the Commissioner executed it, he accepted title to the shares of New Company subject to the conditions set forth in paragraph 20, that is, to the right of New Company to acquire that stock through mutualization proceedings had in accordance with the provisions of that paragraph; and the situation is no different than if the stock he received had been preferred stock, subject to call at a price fixed.

Certainly, no one would contend that the Conservator or Liquidator of an insolvent insurance company would have to have the approval of the court to surrender preferred stock, which the court had authorized him to accept in exchange for other assets, upon that stock being called in accordance with its terms. When the court approved Rehab it approved a transaction by which the Conservator was obligated to dispose of the stock he received in exchange for the assets of Old Company in a certain manner and upon certain terms, and it thereby authorized him to consummate the transaction without further order.

If, however, it be assumed that the court must exercise the jurisdiction given it under Section 1037(d), it seems evident that the court did exercise that jurisdiction. Certainly, Rehab agreement involved assets of Old Company of

a market value in excess of $1000; certainly the provisions of paragraph 20 as to mutualization constituted a transaction involving the disposal of the only asset received by the Conservator in exchange for all of the assets of Old Company.

Petitioners argue, however, that, at the time Rehab was approved, the stock of New Company had no market value, and, therefore, they say the court could not then exercise its jurisdiction under 1037(d).

The answer to this argument is clear. In the first place, while the stock of New Company had no market value inasmuch as it was all held by the Conservator and as not subject to sale could have no market value, it did have an intrinsic value which could be measured approximately by the net worth of New Company. And certainly the statute does not preclude the court from giving approval of a transaction involving property which has no market value because not traded in but which has an intrinsic value in excess of $1,000. The court, in liquidation proceeding having acted in approving the transaction which is set forth in paragraph 20, exercised its jurisdiction under 1037d as well as under 1043.

This does not mean that the Commissioner was authorized by the court, or required by the rehabilitation agreement, to consent to any plan of mutualization that might be thereafter adopted by New Company and presented to him as the shareholder of that company. It only means that the court has approved his giving his consent to a plan of mutualization which conforms to the provisions of paragraph 20.

If the plan now presented does not conform to the provisions of that paragraph, then the Commissioner has not consented thereto and is not authorized to consent thereto, and the Commissioner had no jurisdiction to make the order in question. If it does conform, then the Commissioner has, by the terms of paragraph 20, given his consent to it, and

the voting trustees are obligated by the terms of the trust to give their consent, which they have done.

If the plan does not conform to paragraph 20, then the voting trustees do not have power to consent, for the Conservator by vesting them with legal title could not vest them with any greater right to consent than he, himself, had, and he had no power to give and consent to any plan other than one conforming to the provisions of paragraph 20, without first securing court approval of his action. As to whether or not the present plan conforms to the provisions of Section 20 will be dealt with later.

Petitioners further contend that the Rehab did not, and the plan of mutualization does, constitute a disposal of the stock of New Company; that the mutualization agreement must, therefore, be approved by the court; that the Commissioner must, therefore, secure the approval of the court before he can consent to it.

This contention is answered by what we have already said. It is true that the mutualization plan is an agreement providing for the eventual sale of the stock of New Company, and that it provides for the present transfer of the legal title thereto to certain named voting trustees. But this agreement is a part, or, we might better say, the end result, of the transaction which was approved by the court when it approved paragraph 20 of the rehabilitation agreement.

Petitioners next contend that the order approving the Rehab agreement was void in that the court did not have before it a justiciable controversy as to the fairness, etc., of the plan of mutualization.

As heretofore pointed out, the court in the liquidation proceeding never had jurisdiction of a plan of mutualization as such, but it did have jurisdiction to determine whether or not the Commissioner should agree in advance to abide by a plan promulgated in accordance with the pro-

visions of paragraph 20 of Rehab. It did give its approval of that transaction. It may have erred in so doing. It may have acted unwisely in so doing, but it had jurisdiction so to do, and its order cannot be attacked here.

Petitioners next contend that the court could not delegate its duty under 1037(d) to give or withhold approval of the price and the terms upon which the stock of New Company could be disposed of by the Commissioner. The answer to this contention is that the court did not delegate its duty. Its duty was to approve or disapprove the Rehabilitation Agreement which included a transaction involving a disposition of New Company's stock; this duty it exercised.

The Petitioners contend that paragraph 20 of the Rehab agreement is void because thereby the Commissioner delegated his statutory power to determine the price and the terms upon which the stock of New Company should be sold. This contention, of course, is answered by the fact that the order adjudging the validity of paragraph 20 is now final, and the agreement is, therefore, not subject to attack in this proceeding. But, it is further answered by a consideration of the powers vested in the Liquidator by the statute. The powers granted to the Conservator by Section 1037 are very broad, and he is required only to have a court approval of the transaction involving property of the estate of a market value in excess of $1,000. He is empowered to deal with property in his hands upon such terms and conditions as he may deem proper, subject only to court approval in the instance above mentioned. Certainly, this power is broad enough to encompass a transaction by which he grants an option to buy at a price and upon terms of payment to be fixed by third person or persons.

It is true that the Commissioner acts as trustee, and it has often been held that a trustee may not enter into

option contracts where the price and terms of payment are to be fixed by third persons, but in none of the cases which I have cited were the powers granted the trustees as broad as the powers granted the Liquidator by Section 1037.

Petitioners contend, however, that the Liquidator in the performance of his duties is declared by Section 1059 of the Insurance Code to be a public officer acting in his official capacity in behalf of the state, and from this they reason that in handling an estate in liquidation he is bound by the same strict rules as govern in the handling of public funds or property.

This is not a proper conception of the meaning of Section 1059. The purpose of the Legislature in enacting 1059 and declaring that the Liquidator in the performance of his duties should be deemed a public officer, was to make it clear that in acting as a trustee of an estate in liquidation, he was still bound by the provisions of Political Code Section 4295 insofar as the provisions thereof are applicable. These provisions are now set forth in Sections 6100-04 and 6110 of the Government Code. The conclusion I have come to is made clear when one considers the large discretion and extensive powers granted a liquidator by Section 1037, to which I have already called attention. In exercising these powers he acts as trustee of a private trust, not a public trust. He handles, not public, but private funds and property. His acts affect not the public, but the policyholders, stockholders and creditors of a private corporation.

The petitioners contend that the Legislature could not have granted the Liquidator power to delegate the powers granted to him by statute, and that, therefore, the power to delegate his powers could not be given by contract. These questions, like all others attacking the validity of the rehabilitation agreement, are foreclosed by the finality of the order approving the validity of that agreement.

Petitioners contend that the Liquidator could not give his approval of the plan of mutualization until after its

adoption by the directors of the Company. I think they are correct in this contention. However, by the terms of the rehabilitation agreement, he is obligated to give his consent, and equity will look upon that as done which ought to have been done.

Further, as the Conservator was bound to give his consent, so were the voting trustees, and they have consented. Ordinarily, voting trustees cannot give consent to the sale of stock, and thus destroy their trust, but where the trustor is bound to consent, and the trustees are so empowered, their consent binds him.

Here the voting trustees were obligated by the terms of the voting trust agreement to carry out the rehabilitation agreement, and as this agreement bound the Liquidator to vote the stock, so as to approve the mutualization plan—the reason which ordinarily requires the consent of the beneficial owner, to action by the trustees which will destroy the trust, is absent.

Petitioners next contend that the rehabilitation agreement is against public policy and void because it seeks by contract to mutualize New Company, contrary to the statutes as to mutualization of insolvent insurers.

They argue that New Company is but the alter ego of Old Company and but an agency of the Liquidator, and that, therefore, any proceeding for its mutualization must be had in accordance with the provisions of Section 1043-1062 of the Insurance Code. This contention is without merit.

On being appointed Conservator the Commissioner had the option of doing any one of four things: First, he could liquidate Old Company, or under Section 1043 of the Insurance Code, he could mutualize it, reinsure its business, or rehabilitate its business. He chose to do the last, and through it to accomplish partial reinsurance of the business of Old Company.

In carrying out his choice, he formed New Company and transferred all of the business of Old Company to it. After this transfer, Old Company ceased to be an insurer. It had no policyholders. It had no power to write insurance. It was merely a corporation that had been an insurer, in the process of liquidation. New Company was not, and is not, insolvent, and while under limited supervision of the Commissioner by the terms of the rehabilitation agreement, it is not now and never has been in his hands as Conservator or Liquidator. Since the approval and execution of the Rehab agreement, the Commissioner has not, either as Commissioner or as Conservator, or as Liquidator, possessed or had title to any of the assets of New Company. Rehab, and the order approving it, divested him of all right and title to the assets of New Company which had vested in him by the order appointing him Conservator.

No fraud is perpetrated by failure to pierce the alleged corporate veil of New Company, nor does recognizing it amount to a mutualization of an insolvent insurer through contract and in a manner not authorized by law.

New Company is a solvent insurer, and the only statutes that are applicable to its mutualization are the sections of Chapter 13, Division 2, Part 2 of the Insurance Code.

Petitioners further assert that the corporate entity of New Company must be disregarded and the agreement of mutualization treated as if it were one for the mutualization of Old Company, an insolvent insurer, because they say that if this is not done the Insurance Commissioner becomes a judge in his own case and is disqualified from acting pursuant to Sections 11526-7 of the Insurance Code.

The Commissioner as Liquidator has no personal interest in the property he holds. He is purely a statutory trustee. As such trustee he is a distinct juristic person from the person who acts as a statutory administrative officer.

Even if it be assumed that the Commissioner, acting as such, and the Commissioner, acting as Liquidator, is not two separate juristic persons, still the court should not pierce the corporate veil. The corporate veil is only pierced to avoid injustice. Here, if the veil were pierced and the New Company treated as insolvent, the effect of doing so would be disastrous. It is difficult to see how the corporation could be treated as insolvent and mutualized as an insolvent insurer without seriously affecting the transaction which it entered into as solvent insurer, without any approval of the court or commissioner.

Between the two situations, that of permitting the Insurance Commissioner to function as an administrative officer despite his interest as statutory trustee in the matter to be decided upon by him as Commissioner, and the evil that would result from treating New Company as an insolvent insurer, there can be but one choice.

The petition here alleges that certain members of the PDC have in the past had, through corporations or firms of which they were officers or members, business relationships with New Company, and that these relationships disqualified them to act as arbitrators (that is, members of PDC). Petitioners, by their briefs, have strongly pressed this matter.

The answer to their contention is threefold:

A. The parties, by Rehab, agreed that the appointing committee might choose the persons to act as members of PDC; they thus consented to the appointment of any person chosen in good faith by that committee, and no charge is made that it did not act in good faith.

B. The business relationships alleged (as admitted by the answer of New Company), are of such a character as would not, as a matter of law, disqualify the person from acting as a member of PDC.

C. No evidence was offered before the Commissioner upon this question, although the record shows that the Petitioners were then informed of the matters they now allege. The question is, therefore, not open for decision here.

What I have heretofore said disposes of all questions raised by the Petitioners, except two. These questions are:

First: Is the plan approved by the order of the Commissioner one such as is contemplated by the rehabilitation agreement and one, therefore, to which the Liquidator has, by the terms of the rehabilitation agreement consented?

Second: Are the findings of the Commissioner that the plan protects the rights of Old Company and its shareholders and that it will be fair and equitable in its operation, supported by substantial evidence in the light of the whole record?

I think both of these questions must be answered in the affirmative.

By the provisions of Rehab the parties submitted to PDC for determination the question of whether, in the opinion of the Committee, mutualization was then (at the time of its report) practicable. The Committee has answered this question in the affirmative and unless their decision was arbitrary, the parties are bound by that decision.

Petitioners contend, however, that the plan proposed by the Committee in and of itself demonstrates that the Committee's decision that mutualization if "then practicable" was arbitrary because they say the plan does not provide either for the present consummation of mutualization or for a process of mutualization under which New Company is unconditionally obligated to buy and the shareholders unconditionally obligated to sell upon terms definite as to price and time of payment, but only provides for a process of mutualization under which the consummation

of mutualization is dependent upon certain future contingencies.

Their point would be well taken if paragraph 20 of Rehab could only be interpreted as contemplating present consummation of mutualization or a contract which provided unconditionally for the purchase and sale of the stock of New Company by it upon terms definite as to price and terms of payment. Paragraph 20 is subject to the interpretation just stated and which Petitioners would place upon it, but that is not the only reasonable interpretation that may be placed upon it and is not the interpretation placed upon it by PDC or the Commissioner.

Paragraph 20 of Rehab, when taken by its four corners and viewed in the light of the circumstances that existed at the time of its approval by the Court in the liquidation proceedings and its execution by the parties, is reasonably subject to the interpretation that it contemplated the adoption of a plan of mutualization under which the consummation of mutualization might not only be delayed but might be contingent upon the happening of future events.

At the time Rehab was entered into the stock of New Company had no value and could not even have a potential value until such time as the operation of New Company had indicated the probability that it could from its trust earnings make restoration of Non-Can benefits. The parties, by their agreement, therefore, postponed the time at which mutualization might be proposed by the policyholders for approximately ten years. By their contract they did not provide that at the expiration of ten years mutualization should take place, but only that a plan for mutualization might then be adopted, if, in the opinion of a price determination committee, it could then be adopted, having *due regard for the interest of all persons interested in New Company.*

The terms of paragraph 20 clearly indicate that the parties contemplated that the plan presented by the PDC might provide for an extended process of mutualization. The surrounding circumstances and undisputed facts show that they must have contemplated that the consummation of mutualization under any such plan might be defeated.

Paragraph 20 outlines the plan that may be presented by PDC. It provides that the plan shall specify not only the price but the terms of payment, shall name the persons by whom and the manner in which the right to vote the stock is to be exercised pending the complete payment of the price; that it may to that end provide for the creation of a voting trust and shall not only designate the initial trustees but make provisions for the appointment of their successor. It expressly provides that a plan may be adopted before the restoration of Non-Can benefits, but that in that event that "such mutualization" (that is the mutualization provided for by the plan) shall not affect the right of holders of Non-Can policies to the restoration of benefits as provided for in the agreement.

If the parties had contemplated that any plan promulgated by PDC should provide for the immediate consummation of mutualization, there was no reason to make provision for the stock to be held by anyone pending the payment of the price fixed. There was no reason for the appointment of voting trustees or for the appointment of successors to the initial trustees. It is evident that the parties contemplated that PDC might present a plan which provided for a process of mutualization to occur at a future date. Further than this, the plan expressly contemplates the adoption of a plan before the restoration of Non-Can benefits, but it also provides that in proposing a plan the PDC were obligated to protect the interests of Old Company and its shareholders. It seems to follow that the parties

must have contemplated that any plan adopted before the restoration of Non-Can benefits would of necessity have to defer consummation of mutualization until after that event for otherwise any amounts paid to New Company would, under the provisions of paragraph 19 of the agreement, have to be applied to the restoration of those benefits, thus depriving Old Company and its shareholders of any benefit therefrom.

Restoration of Non-Can benefits could only be made out of the corporate earnings of New Company. If a plan were adopted before the restoration of Non-Can benefits, the consummation of mutualization under the plan would of necessity have to be contingent upon the corporate earnings of New Company being sufficient to make restoration. It follows that the parties must have contemplated that such a plan might be defeated if the earnings of New Company were insufficient to accomplish restoration within the time limited by the plan.

I tnink the interpretation of paragraph 20 I have just indicated is a reasonable one, and that I, therefore, should not and can not substitute my judgment for that of the Commissioner and the PDC. I hold, therefore, that the plan presented and passed upon by the Commissioner is one contemplated by the Rehabilitation Agreement and is, therefore, one to which the Liquidator has consented, and that the Commissioner had jurisdiction to make the order under review.

Petitioners contend, however, that the finding of the Commissioner that the plan protects the interests of Old Company and its shareholders is not supported by substantial evidence. They say it was the duty of the Commissioner to make his own determination from evidence of the value of the stock of New Company at the date fixed by the plan for mutualization and to determine whether or not the price fixed was, in view of that fact, a fair price. They say that

the Commissioner did not have any evidence before him from which the value of the stock of New Company could be determined as of the date fixed for the acquisition of that stock by New Company and the payment of the price, and that therefore the Commissioner's finding is not supported by substantial evidence.

It is undoubtedly true that it was the duty of the Commissioner to determine whether or not the plan protected the interests of the shareholders of Old Company, but it does not follow that it was his duty in the present case to look behind the report of the Price Determination Committee and make an independent determination of the value of the stock and the fairness of the price. In the present case the shareholders, by paragraph 20 of Rehab, agreed that the price to be paid for the stock should be fixed by the Price Determination Committee, and agreed to dispose of the stock at the price and upon the terms it fixed, and the committee, having fixed a price and the terms of payment, the shareholder is obligated to accept that price unless PDC acted arbitrarily. (There is no question of fraud or gross mistake involved.)

As the plan presented gives to the shareholder the price for which he has agreed to sell, it protects him, and the Commissioner was bound to so find unless the evidence disclosed that PDC acted arbitrarily in fixing the price.

The Petitioners contend that PDC did act arbitrarily. They point out that under the plan mutualization will not in fact occur for approximately 25 years, and that the PDC can not fix, and had no facts before it from which it could fix the value of the stock as of that time and that therefore it had no basis upon which to fix a price to be paid as of that time.

It must be conceded and Respondents do concede that neither PDC nor the Commissioner had any facts before them from which either the market value or the intrinsic

value of New Company's stock could be determined as to the time fixed for consummation under the plan. PDC was not, however, charged with fixing the value of the stock as of the date of consummation, but charged with fixing a price to be paid as of that date. "Price" in its broadest sense is synonomous with "value", but in its narrower and more common sense it means the amount of money to be given in exchange for something else, and I think it is in that sense that the word is used in paragraph 20 of Rehab.

PDC did fix that price. It fixed it at $3,000,000 plus simple interest and in certain events, other augmentations. Unless it acted arbitrarily in so doing, its determination of the price to be paid is final and binding upon the parties.

An arbitrary act or decision is one "arrived at through the exercise of will or by caprice, one supported by mere option or discretion and not by a fair or substantial reason." (*Bedford Investment Co.* v. *Folb,* 79 Cal. App. 2d 363, at 366.) The committee's decision was not such.

The facts which the PDC had before it, as shown by the record here, were sufficient to uphold findings that: the present value of the stock was not in excess of $3,000,000; that if that value were now paid (and New Company could pay it now from its present capital and corporate surplus and still remain solvent), Petitioners could receive no benefit therefrom; that if all the future earnings of New Company were discounted at a reasonable rate, their present value would be an amount insufficient to restore Non-Can benefits, and that, therefore, even if that value were fixed as the price to be paid and New Company were in a position to pay it, still Petitioners could receive no benefit; that the right of Non-Can policyholders to restoration was a prior charge upon all corporate earnings of the Company; that a present value of $3,000,000 was only justified if the earnings of New Company were sufficient to enable it to complete restoration of Non-Can benefits by the middle of 1974.

On the basis of these facts it cannot be said that the committee acted arbitrarily and without substantial reason in fixing the price and terms of payment. The committee was dealing not with ascertained facts but with future probabilities. It of necessity had to recognize that there was no certainty that the earnings of New Company would be such as the committee, on the basis of all the presently known facts, calculated they would be. In order to protect the rights of Petitioners they had to defer payment until New Company had been able to make restoration of Non-Can benefits. If the Company were able to make such restoration prior to the middle of 1974 (the date indicated by the studies of PDC), then the present value of $3,000,000 was too low, and the committee provided for such an event by adding to that price an augmentation of $250,000 for each full year by which complete restoration antedated December 31, 1973. On the other hand, if New Company should be unable to make restoration of Non-Can benefits until after 1974, the present value of $3,000,000 is too high, for in fixing that value the committee had assumed that the shareholder would be entitled to all earnings after that date. In this latter contingency, however, the plan does not provide for any reduction of present value, but places the risk of it on New Company. The committee could with reason have treated the benefit thus given the shareholder as a further compensation for the delay in payment.

The committee of necessity had to take the situation of all parties and all of the facts and circumstances in consideration in fixing a price, and in view of this we can not say that their conclusion as to the amount to be paid was not a rational one.

PDC might well have approached the problems presented to it and resolved those problems differently than they did. We may not agree with their approach or with

their reasoning, but we cannot say, nor could the Commissioner say, that they acted without reason, and neither the Commissioner nor this Court can substitute his or its reasoning for that of the committee.

I have arrived at this last conclusion reluctantly because of the fact that all the shareholder presently receives under the plan is a conditional promise to pay a sum of money at a distant date in the future and this promise has a present value, if the sum to be paid is discounted, for interest only, at 3%, much less than the sum which the committee finds to be the present value of the stock.

It follows that the petition for a peremptory writ of mandate must be denied and the alternative writ discharged. I find that the Commissioner had jurisdiction, that there was a full and fair hearing upon notice before him, and that his findings are supported by substantial evidence.

Counsel for respondents will prepare findings and judgment.

PAUL NOURSE
Judge.

March 24, 1952.

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